United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7233

ORIGINAL

To be argued by
LESTER E. FETELL

United States Court of Appeals

FOR THE SECOND CIRCUIT

RALPH McKECHNIE,
Plaintiff,

against

BEACH HAVEN ASSOCIATES, INC. and WORTHMAN HOUSING ASSOCIATES, INC.,
Defendants.

WORTHMAN HOUSING ASSOCIATES, INC.,
Third Party Plaintiff-Appellant,

against

COLLYER ASSOCIATES, INC.,
Third Party Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Statement

This in an appeal from that portion of a judgment entered April 12, 1977 which dismissed Worthman's

third party complaint as against third party defendant Collyer.[1] (a35).

The sole parties to this appeal are Worthman and Collyer.[2]

Worthman made a timely motion for a directed verdict, and a post verdict motion for judgment n.o.v. pursuant to FRCP 50 (b) (a20), which was denied in a written memorandum and order (a22). Appellant seeks a reversal and direction of a verdict n.o.v. *Oliveras* v. *American Export Isbrandtsen Lines, Inc.,* 431 F2d 814 (CA 2d 1971).

Plaintiff, Ralph McKechnie, alleged an accident and resultant personal injuries sustained during the course of his employment as an ornamental ironworker for Collyer Associates, Inc. during construction of senior citizens apartments in New Rochelle, New York.

Worthman Housing Associates, Inc. was the owner of the premises under construction and acted as its own general contractor.

Pursuant to a contract dated September 18, 1972 (a123), plaintiff's employer, Collyer Associates, Inc., was to furnish all materials, supervision, labor, tools and equipment to completely face the parapet inside and out on the roof, and the two canopy facias over the entrances to the buildings.

Plaintiff alleged that on December 18, 1972, at approximately 2:00 P.M. he mounted a partially completed

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[1] Plaintiff's judgment has been substantially satisfied, and plaintiff is not involved in this appeal.

[2] Defendant Beach Haven Associates, Inc. was improperly sued, and the action against it was discontinued, with prejudice. (a3)

canopy for the purpose of doing certain ornamental iron work to complete the erection of said canopy. Plaintiff stated that he mounted the incomplete canopy from an "A" frame ladder. Spanning two of the structural steel supports for the canopy (which were cantilevered from the structural steel of the building) was a piece of plywood some four feet by eight feet in dimension. He alleged that while he was standing on that portion of the plywood, the entire four foot by eight foot section of plywood slid off the top of the incomplete canopy and he and the plywood were propelled to the ground below.

Plaintiff commenced an action (a5) against Beach Haven Associates, Inc. and Worthman Housing Associates, Inc., alleging that they were the owners and general contractors. The action against Beach Haven was discontinued. (a3).

Worthman Housing Associates, Inc., in turn, commenced a third-party action against plaintiff's employer, Collyer Associates, Inc. (a12).

The third-party complaint was bottomed on the two separate concepts. The first being one for *full indemnity* pursuant to a hold harmless agreement which is contained in the aforesaid contract running between Worthman Housing Associates, Inc. and Collyer Associates, Inc.[3] (a14).

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[3] "11.20. The subcontractor shall indemnify and hold harmless the contractor and all of his agents, servants and employees from and against all claims, damages, losses and expenses, including attorneys fees *arising out of or resulting from the performance of the subcontractor's work under this subcontract* provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or

(Footnote continued on following page)

The second basis for the third-party complaint was contribution, in whole or in part (a15) pursuant to the New York rule enunciated in *Kelly* v. *Diesel Constr.*, 35 N.Y. 2d 1; and *Dole* v. *Dow Chemical Co.*, 30 N.Y.S.2d 143, 331 N.Y.S.2d 382.

Plaintiff's recovery against Worthman was bottomed upon a claim of violation of Section 240 of the New York State Labor Law, as amended in 1969[4], and the no-fault

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(Footnote continued from preceding page)

death, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting therefrom, and (b) *is caused in whole or in part by any negligent act or omission of the subcontractor* or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder." (italics added)

"11.20.1. In any and all claims against the contractor or any of his agents or employees by any employee of the subcontractor, anyone directly or indirectly employed by him or anyone for whose acts he may be liable, the indemnification obligation under this paragraph 11.20 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts."

[4] § 240. *Scaffolding and other devices for use of employees*

1. All contractors and owners and their agents, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

ramifications thereof, as enunciated in the landmark decision of the New York Courts in *Rocha* v. *The State of New York,* 352 N.Y.S.2d 990, aff'd. 360 N.Y.S.2d 484 (App. Div. 3d Dept.); lv. to appeal to Ct. of Appeals den. 36 N.Y.2d 642 (1975), wherein it was held that an owner and/or general contractor may be held vicariously liable to construction workers, who are injured by reason of improper scaffolds, and that such liability is unrelated to direction or supervision; by reason of *status* alone. Contributory negligence is not a bar in whole or part. What is, or is not, a scaffold is a question of fact.[5]

It was traditional wisdom that where a tort feasor was found to have violated a safety statute, such as Sect. 240, no third party claim would be permitted on the ground that to permit such casting-over of liability would vitiate the punitive rationale of the statute. In *Kelly* v. *Diesel Constr. Div. of Carl A. Morse, Inc.,* 35 N.Y.2d 1, the New York State Court of Appeals overruled the old doctrine and permitted, if not encouraged, owners and general contractors (subjected to such no-fault liability) to obtain financial relief by agreements with those they hire (i.e. subcontractors) *Rocha* v. *State of New York,* 360 N.Y.S. 2d 484 at 488. (*Kelly* v. *Diesel,* supra, is the construction case *Dole* v. *Dow* counterpart).

The aforesaid contract contained two *alternative* preconditions for indemnification; the injury to the claiming construction worker, giving rise to the suit, must have been brought about "in whole or part by a negligent (1) act or (2) omission" of the subcontractor (a131).

Judge Dooling ruled that alternative (1) (negligent act) would be submitted to the jury as a question of fact, and that alternative (2) (negligent omission) did not ap-

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[5] In the case at bar, the jury found the structure to be a scaffold and that finding is now the law of the case.

ply as a matter of law, on the ground that there was no underlying duty on the part of Collyer which would give rise to a culpable omission.

Appellant Worthman asserts two areas of reversible error.

1) The ruling that Collyer did not have an underlying duty to provide a proper scaffold was erroneous, as a matter of law.

2) The trial court failed to recognize the direct obligation running from Collyer (the indemnifying subcontractor) to Worthman (the indemnified owner/general contractor) which obligation was negligently breached. The aforesaid obligation is separate and distinct from Collyer's negligent breach of its statutory obligation running to its employee McKechnie. *Carinha* v. *Action Crane,* —— N.Y.S.2d —— (App. Div. 1st Dept. June 28, 1977).

3) The submission of the negligence aspect of the third party suit was submitted to the jury with improper instructions.

Since the indemnification agreement creates primary contractual obligations, if the court below erred, the Court of Appeals may enter a judgment against Collyer n.o.v.

Oliveras v. *American Export Isbrandtsen Lines,* 431 F.2d 814 (CA 2d 1971).

THE LAW

POINT I

Sect. 240 of the New York Labor Law mandates subcontractors to furnish safe scaffolds to the subcontractors' employees, in equal degree to the obligation which devolves upon an owner or general contractor. At bar Worthman and Collyer had coequal obligations to furnish a safe scaffold to plaintiff McKechnie.

The legal issue here presented is one of first impression, in both Federal and State Courts. The issue is very narrow, not at all complex, but one of extreme importance in the area of construction tort law. Judge Dooling has characterized the question as "close" and the "considerations as nicely balanced as can be . . . imagined" (a27).

An understanding of the problem requires reference to pre-1969 law, in order to juxtapose the 1969 amendment, and then to ascertain the legislative purpose for the amendment.

Under the pre-1969 Section 240 of the Labor Law, the only one who could be held liable for failure to furnish safe scaffolding was "a person employing or directing another to perform labor of any kind in the erection", etc. of a building. The words "persons employing" are unambiguous. The pre-1969 cases absolving an Owner or general contractor (who did not direct or supervise the work) from liability under Section 240 are legion. A representative case, and a leading one at the time, is *Iacono* v. *Frank & Frank Contracting Co., Inc.*, 259 N.Y. 377 (1932). Where owners, or general contractors, for whatever reason, did in fact supervise the work, they subjected themselves to 240 liability, on the ground that

they were "directing another". See for example *Wohlfron* v. *Brooklyn Edison Co., Inc.*, 265 N.Y.S. 18 (1933) aff'd 263 N.Y. 547.

As a practical matter, injured workman could not assert 240 liability against a person employing them by reason of the fact that State workmen's compensation statutes barred such suits. Absent a showing that one not employing them actually directed their work, workmen injured by reason of defective scaffolds were relegated to their minimal claims under workmen's compensation.

Scaffolds and other devices[6] (enumerated under Section 240) and shaftways, hatchways and stairwells (enumerated under Section 241(a) of the Labor Law) were singled out for special attention by the Legislature. *Horan* v. *Dormitory Auth.*, 349 N.Y.S.2d 448. A multitude of other accident-producing instrumentalities on construction projects were relegated to the mandate of Section 200, the classic "safe place to work" statute.

In the historical development of the Labor Law, two general classes of accident-producing instrumentalities were catalogued: Those which were of an extremely high risk, i.e., scaffolds, hoists, stays, ladders, slings, hangars, blocks, pulleys, braces, irons, ropes (Section 240); elevator shaftways, hatchways and stairwells (241(a), which classes of instrumentalities were especially described in *Koenig* v. *Patrick*, 298 N.Y. 318. The balance of instrumentalities were catalogued under Industrial Code 23.

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[6] Absence of guy wires to support a steel column: *Porter* v. *Avlis Contr. Corp.*, 394 N.Y.S.2d 226, 229 (App.Div. 1st Dept. (1977); Improperly supported crane which toppled over: *Carinha* v. *Action Crane Corp. et al.*,——N.Y.S.2d——(App.Div. 1st Dept. June 28, 1977) slip opinion 4139-40.

The first group of high risk instrumentalities enumerated in Sections 240 and 241(a) were held to be of such high risk that the failure to provide safeguards created liability *as a matter of law, Koenig* v. *Patrick*, supra. With respect to the instrumentalities catalogued under the Industrial Code, it is the present State of New York law that failure to provide safeguards is some evidence of negligence, to be considered by the finder of fact. Historically, where a violation of 240 or 241(a) was found to exist, the Courts of New York denied the violator the right to seek indemnification.

Various schemes, devices and fictions of avoidance began to evolve, in an attempt at insulation from the strict legislative mandates of 240 and 241(a)[7].

The 1969 Amendment of Section 240 was the legislature's answer to such avoidance devices.

By its use of words "all contractors" the New York legislature clearly and logically intended to employ a

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[7] In the maritime field, where the warranty of seaworthiness doctrine is a counterpart of the safety statutes referred to here, one recalls that shipowners went so far as to purchase stevedoring companies, in order to be able to invoke workmen's compensation statutes as a shield from suit by longshoremen. The device was held to be ". . . a nice try (which) didn't work . . ." *Nations* v. *Morris*, 1973 AMC 1413, 1419. The Supreme Court struck down this artificial barrier in *Reed* v. *S.S. Yaka*, 373 U.S. 410, and gave leave to longshoremen to bring a direct suit against the shipowner, where such shipowner owned the vessel. In the construction field, persons or firms having buildings or structures erected for them attempted insulation from the strictures of 240 and 241(a) of the Labor Law by the device of hiring independent contractors to perform their work. These firms, in turn, were able to reduce their exposure by arranging to have the dangerous instrumentalities, such as scaffolds or ladders erected by other subcontractors (*Sarnoff* v. *Chas. Schad, Inc.*, 222 N.Y.2d 180). The injured workmen were then confronted by the Workmen's Compensation Law as a remedy bar.

phrase which would *enlarge* the class, and *extend* the umbrella of obligation over a larger class of contractors than was previously the case, thereby permitting recovery by an injured workman from any member of the class amenable to suit. If one such culpable class member was financially irresponsible, or protected by the shield of the Workman's Compensation statute, the injured man could assert his claim against any remaining member of the class. The one or ones so sued could adjust their own financial risk by asserting their rights under *Kelly* v. *Diesel,* supra, or by other contractual arrangements.

Chief Judge Breitel, in *Kelly* frankly noted that the problem was a financial one, involving *financial risk spreading* (through insurance coverage). The risk was to be spread among all construction firms involved in the accident producing project.

During the course of the trial Judge Dooling commendably involved all counsel in the development of his charge to the jury. Early on in the trial he submitted to each attorney a draft of his proposed charge and invited counsel to comment and argue their respective legal contentions. The charge went through at least four drafts. It was the Court's initial reaction (a89, 91, 92) that Collyer and Worthman had co-equal obligations, under Sect. 240, to provide plaintiff with a proper scaffold, and that if the jury found in favor of plaintiff, the court would direct a verdict of full indemnity by reason of Collyers contractual agreement that it would bear the full financial burden, even if its conduct contributed to the accident in a lesser degree than Worthman (by reason of the words in the agreement "in whole or part").

Collyer's counsel, in the highest tradition of advocacy, evolved a most novel theory; he argued that the Legislature intended to *compress* the class culpable contractors

and to place the *entire* burden upon owners or general contractors. Counsel could submit not a solitary case in support of this proposition, for indeed there is no stare decisis basis for the argument. He submitted a brief which attempted to evolve a basis for his argument, relying upon a convoluted reference to legislative amendments to other sections of the labor law.

Judge Dooling, to the end, indicated his disagreement with Collyer's argument, but opined that he would bound by language contained in the "meagre legislative history" (a26) of two sponsors of the bill and the report of the State AFL-CIO, which "make clear that the intention was to return the safety responsibility to where it belongs—owners and general contractors".

The Court's literal reading of a patently inartfully drawn legislative report has resulted in an erroneous interpretation of the law. *The legislative report must be read in the context of what the drafters were attempting to accomplish at the time.* Prior to 1969 owners and general contractors, with the good sense to avoid supervision or the actual furnishing of scaffolds, were immune from suit. The sponsors of the proposed amendment to Sect. 240 were attempting to afford *greater* protection to injured workmen. The AFL-CIO, as representatives of construction workers, certainly would support this endeavor. Accordingly, it was only proper that they draft a legislative report which would explain the rationale of casting vicarious, no fault, liability upon an absent owner, or general contractor and so the report was prepared with that emphasis. *No where does there appear language of exculpation of subcontractors, only language of inculpation of owners and general contractors.*

In examining the intent of the drafters and supporters of the amendment, one must recognize their ultimate pur-

pose. If the class of culpable contractors was diminished, there was a clear danger that the remaining members of the class might be financially irresponsible or underinsured, to the detriment of the injured workman. One recalls the language of Judge Learned Hand, in a case whose title eludes counsel, where he urged that by liberalizing the rights of a seaman, the shipowner may have been subjected to increased financial exposure, which the shipowner could in turn pass on to shippers, who in turn could pass on the additional cost to the consumers of the cargo. This same rationale is clearly the present day trend in construction cases, as was so cogently expressed by Chief Judge Breitel in *Kelly,* supra. The balance is between the unfortunate results flowing from severe injury in high risk industries where there is no opportunity for financial risk spreading, and the more equitable rules enunciated in *Rocha,* supra and *Horan,* supra and *Kelly,* supra.

It would appear that in overemphasizing the basis for *including* owners and general contractors in Sect. 240, the drafters of the legislative reports did not anticipate that they were creating an ambiguity which could be erroneously interpreted as words of *exclusion;* which clearly occurred in the case at bar.

This issue was considered in *Rocha,* at 360 N.Y.S.2d 488:

> "In summary, we conclude that the intended result of the 1969 Amendment was to place the primary and non-delegable responsibility under Section 240 on the owner and general contractor who have the means of protecting themselves financially and otherwise by agreements with those they hire (see *Kelly* v. *Diesel Constr. Div. of Carl A. Morse, Inc.,* 35 N.Y. 2d 1."

It is noteworthy that the Appellate Division used the words *primary* responsibility and did not use the words

sole responsibility. In the case at bar the trial court interpreted the Amendment to create *sole* statutory responsibility upon the owner and general contractor.

An analysis of *Kelly* v. *Diesel,* supra, clearly fortifies the contention that the word primary was never intended to mean sole. Chief Judge Breitel, in *Kelly,* properly defined the obligation as one of "first instance liability":

> "The statutes mandate *first instance liability* on the owner or general contractor. . . ." (358 N.Y.S.2d at 689).

The facts in *Kelly* v. *Diesel,* supra, are inapposite by virtue of the fact that in that case the rights asserted were under common law principles and there was no claim of an indemnification agreement (358 N.Y.S.2d at 686). The law, however, is apposite.

The New York Courts are consistently following and expanding upon the interpretation of Sect. 240 enunciated in *Rocha* v. *N.Y. State,* supra, e.g. *Porter* v. *Avlis Contrc. Corp.,* supra, fn. 6 and *Carinha* v. *Action Crane Corp.,* supra fn. 6. In so doing the New York Courts consistently make reference, and encourage, indemnifications against the prime tort feasor, the plaintiff's employer. In *Carinha* there were several dissents with respect to one aspect of the case, but total unanimity with respect to that portion of the case relevant to the issues at bar. As stated by Presiding Justice Murphy in his partial concurrence:

> I further agree that Section 240(i) places a nondelegable duty upon the owner and general contractor. (Rocha v. State of New York). *So too I would not hesitate to permit an owner and general contractor to be indemnified und appropriate circumstances for any liability incu under Section 240(i).* (italics added).

Mr. Justice Lupiano, in his dissent (with which the majority agreed "except as to that portion" dealing with the claim against Action Crane) analyzed the *Rocha* case, acknowledged that it was the intent of the Legislature to place a *primary* responsibility upon owners and general contractor, and, significantly, referred to the legal proposition that:

> ". . . owner(s) and general contractor(s) 'who have the means of protecting themselves financially and otherwise by agreements with those they hire' Rocha v. State of New York, supra at p. 637".

At bar, appellant's counsel strenuously referred Judge Dooling to the self same language of *Rocha* cited by Justice Lupiano. This Court's attention is directed to the cogent reasons elucidated by Justice Lupiano in support of the proposition that the employer of the injured workman owes an *independent duty* to provide safe equipment. Judge Dooling held that no such independent duty exists, and therefore there was no breach of "omission". In this regard the trial court at bar erred.

Judge Dooling, in an attempt to define the class covered by the words "all contractors" to determine whether subcontractors are subsumed in those words, makes reference (a25) to the fact that in Article 8 of the Labor Law (Public Works contracts) the legislature made reference to both contractors and subcontractors, but left the words subcontractors out of Article 7 (safety statutes). He suggests application of the *inclusio unis* doctrine. It would be valid to state that state legislatures do not have a reputation of being precise drafters of statutes. A court should interpret a statute in a manner designed to support the clear intendment of the legislature, rather than to depend on semantic precision. The legislators who drafted the public contract sections probably were not the same as

those who drafted the safety sections. The purposes of those two areas are unrelated.

The Second Circuit's most recent analysis of legislative intent is to be found in *United States of America* v. *Paul V. Oates* slip opinion No. 1224 (June 3, 1977) at 6447 et seq:

> "Our function as an interpretive body is, of course, to construe legislative enactments in such a way that the intent of the legislature is carried out. In recognition of this responsibility numerous courts have either applied, or at least recognized, the principal that despite the existence of literal language that might dictate a contrary result, a court should interpret a statute in such a way as to effectuate clear legislative intent.
>
> * * *
>
> "Our function is to give effect to the Legislature's intent, and where a literal reading leads to an illogical result, the tempering influence of reasonable construction must be applied. There is no surer way to misread any document than to read it literally" (pg. 6449) citing *Knapp* v. *McFarland,* 462 F.2d 935 (2d Cir. 1972).
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> * * *
>
> "We are to put ourselves so far as we can in the position of the legislature that uttered them, and decide whether or not it would declare that the situation that has arisen is within what it wished to cover." (pg. 6450) citing Judge Hand in *Cawley* v. *United States,* 272 F.2d 443 (2d Cir. 1959).
>
> * * *
>
> "In such circumstances available information concerning the *purpose* behind the use of the language

> that appears in the law can often be of invaluable assistance." (pg. 6451) (italics in original.)

At bar, Judge Dooling has not misinterpreted the statutory words, per se, but rather the words contained in the legislative intent which accompany Sect. 240. He apparently read the language literally, and failed to focus on the purpose of the legislative material.

The most recent New York cases, starting with *Rocha,* all clearly demonstrate that the strict no fault aspects of Sect. 240 may *primarily* fall upon the shoulders of owners and general contractors, from whom injured workmen may seek recompense, but implicit in the ascribing of primary responsibility on them, is the relief afforded by indemnification agreements, which are encouraged by the New York Courts (which have lagged far behind the Supreme Court of the United States. *Ryan* v. *Pan Atlantic* (1955) 349 U.S. 926).

Mr. Justice Lupiano in *Carinha,* supra, quite properly noted that:

> ". . . first instance liability . . . arose from breach of the duties imposed by (Sect. 240), which first instance liability could not be delegated *as against persons injured* by the breach of said duties."

However, *secondary* liability can be delegated, as against prime tort feasors, i.e. the plaintiff's employer, through the device of agreements. *Carinha* pgs. 14-18.

Judge Dooling held that in order to demonstrate that *Collyer* was guilty of a negligent omission (pursuant to the terms of the indemnity agreement) it must first be demonstrated that Collyer owed a duty to the injured employee. The Court looked to Sect. 240 to determine whether such duty was owed by the employer to his em-

ployee (i.e. to furnish a safe scaffold), and he opined that there was no such duty, in which respect he erred. There exists an additional and independent basis for indemnity, which was cogently expressed in *Carinha* v. *Action Crane,* supra:

> "Liability is fixed upon the owner and the general contractor not by virtue of common law negligence, but by virtue of their first instance liability under Labor Law Sect. 240(1) that is by virtue of the 'non-delegable duty imposed upon them by said statute. This duty was delegated by the owner to the contractor, who in turn delegated it to the subcontractor. The subcontractor stands liable for breach of *this duty,* not on account of the injury of Ryan and the death of Carinha. Pursuant to the work which the subcontractor expressly agreed to perform for the general contractor as delineated in their agreement, there devolved upon the subcontractor the duty placed upon the owner and general contractor under Labor Law 240(i) . . . The subcontractor is liable *in full* to the general contractor and the owner for breach of the duty which it, not its servants, owed." (italics in original).

The foregoing expresses the concept enunciated in *Ryan* v. *Pan Atlantic,* supra. In maritime law the concept has been defined as a breach of a contractual warranty of workmanlike performance. Where a contractor retains the services of a subcontractor to perform services which the contractor is required to do either on his own account, or by virtue of an obligation to another[8], the subcontractor warrants that he will perform those services in such a

[8] At bar the owner and general contractor are, coincidently, one and the same—Worthman Housing Assoc. Inc.

manner as to avoid the contractor being cast in damages by virtue of an injury to the subcontractors employee. At bar the indemnity agreement contains language which appears to require a demonstration of *negligent* breach of this duty running between the prime and the sub contractors. This presents no problem since by definition negligence is a failure to do that which a reasonable man is required to do under the circumstances. Factually, Collyer negligently failed to furnish its own employee with a safe scaffold. Judge Dooling read the words "negligent omission" to refer to a negligent act vis a vis its employee, when in fact, he should have measured such negligence with respect to the duty running between the prime and sub contractors.[9] This duty in fact devolves upon Collyer by virtue of a proper reading of Sect. 240. However, even if Judge Dooling's reading of Sect. 240 is correct, Worthman is entitled to full indemnity by virtue of a breach of duty by Collyer, not arising under Sect. 240, but rather for a negligent omission or breach of its contractual obligation to perform its services in a workmanlike manner.

POINT II

The negligence aspect of the third party suit was submitted to the jury under improper instructions.

The Court erred in the following portions of its charge.

The indemnity agreement made reference to "negligent act or omission". The jury found that Collyer did not commit any negligent act. The "omission" portion was disposed of by the court, (Point I, supra).

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[9] Contributory fault by Worthman, if any, is irrelevant, since the contract requires *full indemnity,* if Collyer was guilty of negligence or omission "in whole or in *part.*" fn. 3 supra.

Conceptually, the jury was faced with a most delicate task. On the one hand, the court quite properly charged that in assessing liability of plaintiff versus Worthman, it could not consider contributory negligence. (*Rocha* v. *State of New York,* supra). On the other hand, the jury was charged that it must consider plaintiff's contributory negligence, if any, with respect to the third party claim.[10]

The Court erred in the following portions of its charge:

> "If you conclude that plaintiff was negligent, in proceeding as he did, then that negligence is Collyers, *unless you are satisfied in all the circumstances that the risk was so evident that you conclude that plaintiff's proceeding as he did could not fairly be regarded as an act in the course of his employment and in the service of Collyer.*" (a38)

This was a most unusual charge, and a totally unnecessary limitation on the general law of respondent superior. There were no special or unusual facts in this case to warrant this prejudicial language. Plaintiff McKechnie was Collyer's foreman. Only he and a co-employee of Collyer were present at the time and place of the accident. McKechnie selected the method of performing his work, and there is no testimony in the record to suggest that he selected a grossly unusual method of performing his work. The openness and obviousness of a condition would not give rise to this unusual charge. McKechnie testified that he did not know the boards were loose. His failure to check the boards could be considered contributory negligence of the common garden variety. The charge of the trial court could only come into play if it was shown

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[19] Collyer declined to waive a jury with respect to the third party claim, and maintained its right to have all issues submitted to the jury.

that plaintiff had acted in a totally irrational or grossly reckless manner; which this record does not demonstrate.

This jury had a difficult enough time in dealing with the issue of contributory negligence on two levels. The introduction of this erroneous factor in the charge was error.

> "In considering the claim over against Collyer your task is to determine whether Collyer breached the duty it owed to plaintiff to furnish him with *a safe place to work.*" (a238)

The Court erred in describing Collyer's duty in terms of safe place to work. Since plaintiff's claim was that he was not provided with a safe and proper scaffold, the charge should have been couched in those specific terms. The safe place to work doctrine brings into play a completely different area of concern under the Labor Law of New York. Sects. 200 and 241(6). The court did not define safe place to work, nor advise the jury in what respect or by virtue of which facts in the record it could assess "safe place to work".

A trial judge is not required to marshall the facts, he is obliged to "discuss the evidence . . . and relate it to the principles of law . . . charge and apply to each party's version the pertinent statutory and decisional law" *Green* v. *Downs,* 27 N.Y.2d 205. (N.Y. Ct. of Appeals 1970), wherein the court held that "general instructions are inadequate" (citing *Barnevo* v. *Munson S.S. Line,* 239 N.Y. 486, 492) see also *Enea* v. *Kuhn, Smith & Harris, Inc.,* 332 N.Y.S.2d 913 (A.D.2d Dept. 1972). "When a state right is being asserted, the state law must be looked to for the substance of the instructions". *Lones* v. *Detroit, Toledo & Ironton R.R.* (CA 6th 1968) 398 F.2d 914.

At bar the instructions with respect to the obligations of Collyer were sparse, and overly general. The jury was

faced with a very technical problem in this case and it was imperative that each element of the charge be carefully delineated.

CONCLUSION

The trial court's denial of judgment over against Collyer was error. Judgment n.o.v. should be granted in favor of Worthman and against Collyer in the full amount of plaintiff's judgment and the matter remanded to the trial court to assess attorneys fees and disbursements.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Second Circuit

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RALPH McKechnie,

Plaintiff,

against

BEACH HAVEN ASSOCIATES INC., and
WORTHMAN HOUSING ASSOCIATES, INC.

Defendants.

WORTHMAN HOUSING ASSOCIATES, INC.,

Third party Plaintiff-
Appellant,

against

COLLYER ASSOCIATES, INC.,

Third Party Defendant-
Appellee.

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On Appeal from the United States District Court for the
Eastern District of New York.

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ADDENDA TO BRIEF FOR APPELLANT.

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ADDENDA TO BRIEF FOR APPELLANT

CARINHA v. ACTION CRANE CORP. et al, cited at appellant's brief at pages 6,8,13,16,17 is now officialy reported at 396 N.Y.S.2d 191.

service of three (3) copies of
the within Brief is
hereby admitted this 22nd day
of August, 1977

Attorney for Calleja